UNITED
NATIONS

Convention to Combat
Desertification

Distr.
GENERAL

ICCD/COP(4)/8
23 November 2000

ORIGINAL: ENGLISH

CONFERENCE OF THE PARTIES
Fourth session
Bonn, 11-22 December 2000
Item 12 (b) and (c) of the provisional agenda[1]

OUTSTANDING ITEMS

(b) CONSIDERATION OF PROCEDURES AND INSTITUTIONAL MECHANISMS FOR THE RESOLUTION OF QUESTIONS ON IMPLEMENTATION, IN ACCORDANCE WITH ARTICLE 27 OF THE CONVENTION, WITH A VIEW TO DECIDING HOW TO TAKE THIS MATTER FORWARD

(c) CONSIDERATION OF ANNEXES CONTAINING ARBITRATION AND CONCILIATION PROCEDURES, IN ACCORDANCE WITH ARTICLE 28, PARAGRAPHS 2(a) AND 6, OF THE CONVENTION

Note by the secretariat

1. By decision 20/COP.3, the Conference of the Parties decided, in accordance with articles 27 and 28 of the Convention, to convene during its fourth session an open-ended ad hoc group of experts to examine and make recommendations, taking into account the documents prepared by the secretariat and in light of progress of the negotiations on the same matters in other relevant environmental conventions, on the following issues: (a) procedures for resolution of questions of implementation; (b) annex on arbitration procedures; (c) annex on conciliation procedures.

2. In the same decision, the Conference of the Parties invited Parties to communicate their views to the Secretariat by 31 May 2000 in writing on how to take this matter forward. The Conference of the Parties also requested the secretariat to compile these views for consideration by the Conference of the Parties at its fourth session and update the information contained in the above-mentioned procedures and annexes, as necessary, to reflect the progress achieved in this area in other relevant conventions, and prepare new documents for consideration at its fourth session.

3. The present document is composed of two parts: Part one contains consideration of procedures and institutional mechanisms for the resolution of questions. It consists of an introduction, background information, written proposals by Parties, data on relevant precedents, new developments and, finally, a section on relevant considerations which may be taken into account for present or future discussions.

[1] ICCD/COP(4)/1.

4. Part two on the annexes on arbitration and conciliation is divided into an introduction, background information, submissions by Parties on these outstanding issues, status of annexes and procedure for adoption, timing of adoption of documents and, at the end, the revised annexes according to new developments in international environmental law and/or written proposal by Parties.

CONTENTS

		Page
I.	**CONSIDERATION OF PROCEDURES AND INSTITUTIONAL MECHANISMS FOR THE RESOLUTION OF QUESTIONS OF IMPLEMENTATION**	3
	A. INTRODUCTION	3
	B. BACKGROUND	3
	C. SUBMISSIONS BY PARTIES	4
	1) Canada	4
	2) Portugal on behalf of the European Union and its Members States	6
	D. RELEVANT PRECEDENTS	7
	1) Montreal Protocol on Substances that Deplete the Ozone Layer (The Montreal Protocol)	7
	2) Convention on Long-Range Transboundary Air Pollution (LRTAP)	8
	3) United Nations Framework Convention on Climate Change (UNFCCC)	8
	4) Procedural aspects of precedents	9
	5) Institutional aspects of precedents	11
	E. NEW DEVELOPMENTS	11
	1) Kyoto Protocol to the United Nations Framework Convention on Climate Change	11
	2) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters	12
	3) Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade	12
	F. RELEVANT CONCIDERATIONS	13
II.	**CONSIDERATION OF ANNEXES CONTAINING ARBITRATION AND CONCILIATION PROCEDURES**	14
	A. INTRODUCTION	14
	B. BACKGROUND	14
	C. SUBMISSIONS BY PARTIES	15
	1) Canada	15
	2) Israel	16
	3) Madagascar	20
	4) Portugal on behalf of the European Union and its member States	21
	D. STATUS OF ANNEXES AND PROCEDURE FOR ADOPTION	21
	E. TIMING OF ADOPTION OF ANNEXES	21
	F. THE DRAFT ANNEXES	21
	1) Draft annex on arbitration	22
	2) Draft annex on conciliation	26

I. CONSIDERATION OF PROCEDURES AND INSTITUTIONAL MECHANISMS FOR THE RESOLUTION OF QUESTIONS OF IMPLEMENTATION

A. INTRODUCTION

5. At its eighth session, the Intergovernmental Negotiating Committee for the Elaboration of an International Convention to Combat Desertification (INCD) considered the question of procedures to resolve questions on implementation on the basis of document A/AC.241/30. This latter document was prepared by the secretariat in response to a request from the INCD by virtue of paragraph 5 of its resolution 6/1 entitled "Organization and programme of work for the interim period" (A/50/74, appendix II).

6. At the same session, the INCD by its decision 8/10 postponed further consideration of the item on "resolution of questions" to the first session of the Conference of the Parties (COP) to the United Nations Convention to Combat Desertification (UNCCD) (A/51/76). Subsequently, by its decision 9/COP.1, subparagraph 3(m), the COP decided to include on the agenda for its second and, if necessary, its third session the item on procedures and institutional mechanisms for the resolution of questions that may arise with regard to implementation (ICCD/COP(1)/11/Add.1).

7. The present note updates document ICCD/COP(3)/16. More particularly, it provides current information with regard to the relevant precedents cited in that document as well as information on new developments. The preliminary list of possible queries outlined in section III of the above-mentioned document is maintained. The background information together with the list of preliminary questions are intended to assist the COP in its deliberations to formulate procedures and mechanisms required for the purposes of article 27 of the UNCCD without attempting to design a "resolution of questions" regime.

B. BACKGROUND

8. Article 27 of the Convention provides that: "The Conference of the Parties shall consider and adopt procedures and institutional mechanisms for the resolution of questions that may arise with regard to the implementation of the Convention."

9. Provisions of that type are generally considered to be a relatively new feature of environmental conventions. They are an attempt to pre-empt and avoid confrontation that might trigger more formal dispute resolution procedures. They are thought to be particularly well suited to global environmental regimes, where many Parties share an interest in the effective implementation of the Convention's objectives.

10. The pre-emptive and consensual approach is becoming the practice in certain new environmental treaties, especially when non-implementation stems from lack of capacity or inadvertence. Because procedures for resolution of questions remain within the jurisdiction of a convention's governing body, they are generally considered as a means of enabling Parties to a convention to discuss its implementation in a constructive and cooperative manner to secure amicable solutions.

C. SUBMISSIONS BY PARTIES[2]

1) CANADA

PROCEDURES FOR THE RESOLUTION OF QUESTIONS OF IMPLEMENTATION:

This submission is presented pursuant to III/20 of the Conference of the Parties to the Convention to Combat Desertification (the "COP"), which requests Parties to provide written comments on the questions of:

- Procedures for the resolution of questions of implementation (Article 27 of the Convention);

- Two draft annexes on arbitration and conciliation procedures (Article 28 of the Convention).

I) PROCEDURES FOR THE RESOLUTION OF QUESTIONS OF IMPLEMENTATION

The matter of Procedures for the Resolution of Questions of Implementation is closely related to the question of Procedures for the Review of the Implementation of the Convention, addressed in COP Decision III/6. As requested in Decision III/6, Canada has already submitted written comments regarding the review of the implementation of the Convention. In this earlier submission, Canada is calling for an Ad Hoc Working Group (AHWG) to address Implementation Review that is limited in size; open and flexible; capable of considering implementation both from a geographical and a thematic perspective; and one which considers both specific questions of implementation at the level of a Party, and general implementation questions at the level of the Convention as a whole. Looking at past experience, including from the discussion held on implementation during COP III, the Canadian submission further stressed the importance of information of high quality, and the allocation of sufficient time for a thorough discussion.

With regard to questions on implementation, it is difficult to foresee with certainty what type of questions might arise. These should become clearer as the process of implementation review is carried out by the AHWG. Procedures for their resolution should remain flexible to respond to them.

Therefore, in light of the findings and avenues explored in the earlier Canadian submission (procedures to review implementation), we submit that, at this time, there is no need for separate procedures to be elaborated under COP Decisions III/6 and III/20. A single procedure, which involves a limited group of Parties working in the margins of the COP - the AHWG - should be sufficient and capable of addressing the various questions of implementation envisaged in Articles 22, 24, 26 and 27 of the Convention.

Canada envisages that such a procedure would function along the following general lines:

a) during the first week of each COP meetings, a small group of experts - the AHWG - would meet on the margins of the COP to review the implementation by Parties of their obligations, on the basis of the information communicated in accordance with the Convention. The review process would also present the venue for a Party to raise specific questions to the group regarding its implementation of the Convention, as well as the implementation by other Parties;

---

[2] Reproduced without formal editing by the UNCCD secretariat.

b) the AHWG would prepare a report to the plenary of the COP, in which it would summarize its deliberations including the work accomplished and lessons learned, etc. The report could also outline questions related to general issues and trends linked to the implementation of the Convention, as well as specific questions raised by Parties;

c) the COP would allow ample time, in the course of its second week, to consider and exchange views on the report of the AHWG. This, with a view to ensure a thorough exchange of information and sharing of experience among all Parties;

d) the COP would decide on appropriate follow-up actions to reports of the AHWG, with a view to facilitate and promote the implementation of the Convention. It could, among other things, task the working group with the further consideration and development of recommendations on the general questions of implementation put to the COP's attention.

Specific questions related to the single process

If the above general approach is agreeable, we would address in the following manner a number of the more specific questions raised by the elaboration of such a procedure:

- principles: the underlying principles to the work of the working group would be those of non-confrontationality, flexibility, simplicity, transparency, prevention and cost- effectiveness, with a view to assist Parties in implementing the Convention. The review would proceed with either a geographic or a thematic approach;

- an ad hoc or a permanent body: The earlier Canadian submission on implementation review provided some pros and cons for each of these two principles. Related to this question are the costs involved, whether there is a need for intersessional work to be accomplished, and the additional burden caused by the preparation of the work of the group. Our view is that the formula of an ad hoc group should be maintained for the time being, on a trial basis, and that the question be revisited at COP VI, on the basis of the experience gained by then;

- composition of the group: we believe that the AHWG should be composed of a limited group of experts, representative of the various interests involved. The exact composition of the Group will require further consideration, on the basis of its mandate and functions. Parties having submitted - or being the object of - a specific question of implementation should be invited to attend the group's session where the matter is discussed. In addition to regular members, the AHWG should be enabled to invite external experts to attend and participate in its sessions, as deemed useful;

- triggers: as such, there would be no need for triggers to the procedures, as reports would be systematically reviewed by the AHWG during the first week of each COP meetings. The COP would also be empowered to request the AHWG to further consider general questions of implementation put to it's attention. In addition, Parties could "trigger" the consideration of specific questions on implementation by the AHWG, related to their own implementation or the implementation by other Parties of the Convention's obligations, by raising questions in this venue;

- basis for the review of the specific implementation by Parties: the quality of the work accomplished by the AHWG will greatly depend upon the quality of the information at its disposal. As indicated in COP Decision III/4 and in the procedures adopted under COP Decision I/11 (the "Procedure"), the work of the group would be based on the information transmitted by Parties in accordance with the Convention, together with advice and information provided by the CST and the GM, and such other reports as the COP may have called for. Specific

questions related to implementation review could be provided in advance or raised at the time in conjunction with the presentation of national reporting;

- role of the Convention's Secretariat: the Secretariat would prepare the work - and service the sessions - of the AHWG: in accordance with the Procedure, the Secretariat is already tasked with compiling the summaries of reports submitted by Parties and preparing a synthesis of these reports, setting out emerging trends. The Secretariat could take on the additional task of documenting any question related to implementation which would be submitted in advance of the COP;

- linkages with settlement of disputes mechanism: An effective mechanism for the review of implementation should reduce the risks of disputes among Parties. The implementation review mechanism should be kept separate from, and without prejudice to, the provisions of Article 28 of the Convention, on Settlement of Disputes.

The particular circumstances of COP IV:

According to COP Decision III/6, an AHWG is to proceed, immediately at COP IV, with the review and analysis of the reports available for all regions, and to draw conclusions and propose concrete recommendations on further steps in the implementation of the Convention. This is a heavy workload. It is therefore proposed that the details of procedure for raising questions on implementation could be tasked to the Panel of Legal Experts which will meet at COP4 to determine rules of Procedure.

2) PORTUGAL ON BEHALF OF THE EUROPEAN UNION AND ITS MEMBER STATES

DRAFT EU SUBMISSIONS ON LEGAL QUESTIONS

The European Union welcomes the convening at the fourth session of the COP of an open-ended ad hoc group of experts to examine and make recommendations on:

(a) Procedures for resolution of questions of implementation;

(b) Annex on arbitration procedures;

(c) Annex on conciliation procedures;

The European Union is pleased to make this submission on these issues in response to Decision 20/COP.3, paragraph 2.

We have also taken this opportunity to set out our views on the outstanding questions on the Rules of Procedure, in preparation for any further discussion at COP4, in accordance with Decision 21/COP.3.

Resolution of Questions of Implementation

The European Union welcomes the opportunity provided by the convening of the open-ended ad hoc group of experts under decision 20/COP3 to start work on the implementation requirements laid down in Article 27.

The European Union recognises the strong commitment amongst all Parties to the Convention to the observance of obligations being made subject to effective compliance procedures.

We also recognize that each Convention is distinctive. It is therefore important to ensure that whatever models for compliance procedures are

considered, the procedure eventually adopted is carefully tailored to meet the particular circumstances and requirements of the UNFCCC.

We are, at this time, of an open mind as to precisely what provisions a successful compliance procedure for the Convention should contain. But our initial thinking is that, having regard to the nature of the Convention's provisions, a process like a multilateral consultative process recently negotiated under Article 13 of the Climate Change Convention would be more appropriate than a compliance regime such as that which operates for the Montreal Protocol. In other words, we believe that the procedure should be advisory rather than supervisory in character. In general terms, we would also wish the procedure to be simple, facilitative, co-operative, non-confrontational, transparent and non-judicial in character.

The experience from other multilateral environmental agreements regarding this matter suggests that compliance procedure requires significant time and therefore it may be possible only to commence work on this important issue at the fourth session of the COP, in the expectation that agreement will be reached at a subsequent session of the COP.

D. RELEVANT PRECEDENTS

11. The most relevant precedents relating to article 27 of the UNFCCC include the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol), the 1994 Protocol on Further Reductions of Sulphur Emissions (the Second Sulphur Protocol) to the 1979 Convention on Long-Range Transboundary Air Pollution (LRTAP), as well as article 13 of the United Nations Framework Convention on Climate Change (UNFCCC).

12. While the few existing precedents provide some legal bases for giving effect to article 27 of the UNFCCC, they must be examined with caution. The balance of obligations varies from one treaty to another. Hence, the procedures and institutional mechanisms need to be tailored to suit individual treaties. The following review of relevant precedents should therefore be examined with this in mind.

1. Montreal Protocol on Substances that Deplete the Ozone Layer (The Montreal Protocol)

13. The full non-compliance procedure of the Montreal Protocol was created by decision IV/5 at the fourth meeting of the Parties to that Protocol (UNEP/OzL.Pro.4/15). The Ad Hoc Working Group of Legal and Technical Experts on Non-Compliance established in September 1997 by decision IX/35 of the Parties to the Protocol had the task of reviewing this procedure (UNEP/OzL.Pro.9/12). The Ad Hoc Working Group presented its final report to the tenth Meeting of the Parties (UNEP/OzL.Pro.10/9). Of the options envisaged, the Meeting of the Parties decided to compile a list of amendments in a decision to the text of the non-compliance procedure. These amendments were chiefly aimed at streamlining the procedure, for example, by setting specific deadlines for sending replies to the Secretariat and for the Secretariat to transmit information to the Implementation Committee. It also entrusted the Implementation Committee with a new task: to identify the facts and possible causes relating to individual cases of non-compliance referred to the Committee and make appropriate recommendations to the Meeting of the Parties.

14. By the same decision, it was decided that in situations where there has been a persistent pattern of non-compliance by a Party, the Implementation Committee should report and make appropriate recommendations to the Meeting of the Parties with the view to ensuring the integrity of the Montreal Protocol, taking into account the circumstances surrounding the Party's persistent pattern of non-compliance. In this connection, consideration should be given to progress

made by a Party towards achieving compliance and measures taken to help the non-compliant Party return to compliance.

15. It is important to note that the Meeting of the Parties agreed as well to review, unless the Parties decide otherwise, the operation of the non-compliance procedure no later than the end of 2003.

2. Convention on Long-Range Transboundary Air Pollution (LRTAP)

16. Decision 1997/2 of the Executive Body of the LRTAP Convention establishes an Implementation Committee for the review of compliance by the Parties with their obligations under the protocols to the Convention. While decision 1997/2 has the effect of applying the new compliance regime to all eight LRTAP protocols, for illustrative purposes only the 1994 Protocol on Further Reduction of Sulphur Emissions is mentioned in the present note.

17. In its first report of 1998, the Implementation Committee decided that it would take all its decisions by consensus. Given that this was the first time that there had been a systematic review of the information reported under the Convention, the review revealed many ways in which reporting could be improved or streamlined. With this in mind, the Committee agreed that the aim of its first review was twofold: (i) to inform the Executive Body about the manner in which information had been reported in past years - timeliness, completeness etc.; and (ii) to advise on ways of improving future reporting.

18. In 1999, one of the major tasks of the Implementation Committee was to discuss the structure of a revised questionnaire to be used for reporting by Parties on their strategies and policies for air pollution abatement. Part I of the questionnaire now covers the mandatory reporting requirements under each Protocol to the LRTAP. Part II of the questionnaire poses questions relating to obligations not covered by the mandatory reporting requirements under the protocols and also serves the purpose of general exchange of information under the Convention. The Committee recognized that only experience would show how well the questions had been formulated and that it would be worthwhile to revert to the questions once the first round of reporting had been completed. The new questionnaire required Parties to provide basically the same information as before, but it gave better guidance on what exactly should be covered by the responses. The Implementation Committee also conducted consultations with experts on emission inventories to lay a basis for an evaluation of the quality of nationally reported emission data.

19. In 2000, the Committee received a first case concerning compliance with a provision of the 1994 Sulphur Protocol, and it will present recommendations on this case for consideration by the Executive Body for the Convention in December 2000. The Committee will also prepare an assessment of compliance by Parties with their obligations under the 1985 Sulphur Protocol, and the 1988 Protocol concerning the Control of Nitrogen Oxides or their transboundary fluxes. Furthermore, it will continue its evaluation of Parties compliance with reporting obligations under all protocols.

3. United Nations Framework Convention on Climate Change (UNFCCC)

20. With regard to the UNFCCC, its article 13 provides that the Conference of the Parties shall, at its first session, consider "the establishment of a multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention."

21. Accordingly, the COP 1 of the UNFCCC established an open-ended ad hoc working group of technical and legal experts "to study all issues relating to the establishment of a multilateral consultative process and its design" (FCCC/CP/1995/7/Add.1, decision 20/CP.1).

22. The report of the meeting of the Ad Hoc Group on Article 13 (sixth session of June 1998) indicates that there is agreement on key areas such as on the objective, nature, how issues should be taken up, mandate and outcome of the multilateral consultative process (MCP). In the same report, the ad hoc working group recommended the adoption of a multilateral process and the establishment of a Multilateral Consultative Committee reporting to the COP of the UNFCCC (FCCC/AG13/1998/2). It should be said that Parties have not yet agreed on the composition of the Committee, period of time its members shall serve, how they shall rotate and how equitable geographical distribution should be understood. The COP of UNFCCC at its fourth session considered the final report of the Ad Hoc Group on Article 13 and decided to approve partially the text of the multilateral consultative process prepared by the Ad Hoc Group on Article 13, with the exception of the issues concerning the constitution of the members of the multilateral consultative committee and how they should be designated among Annex I and non-Annex I Parties.[3]

23. It is to be noted from the outset that the Parties to the Montreal Protocol, the Second Sulphur Protocol and the UNFCCC have all decided that their respective "resolution of questions" regimes shall apply without prejudice to the provisions of dispute settlement procedures already existing in the individual treaties.

24. The following sections 4 and 5 provide updated information on (a) the procedural aspects and (b) the related institutional aspects of the regimes concerned.

4. Procedural aspects of precedents

25. Procedural aspects of mechanisms for the resolution of questions envisaged under article 27 of the UNCCD could address such substantive issues as: the principles governing implementation, i.e. the objectives and nature of the mechanism; powers assigned to the institutional mechanism; who can invoke the procedure; and the outcome of the procedure.

Objectives

26. The aim of the procedure contained in the Montreal Protocol is to secure "an amicable solution of the matter on the basis of respect for the provisions of the protocol". The system of the Second Sulphur Protocol foresees cooperative measures such as assisting Parties to comply with the Protocol. The objective of the MCP under the UNFCCC is to resolve questions regarding implementation of the UNFCCC by providing advice on assistance to Parties to overcome difficulties encountered in their implementation, promote understanding of the UNFCCC and prevent disputes from arising.

Nature

27. The main principles of the non-compliance regime of the Montreal Protocol are avoidance of complexity, avoidance of confrontation, transparency and the leaving of decision-making to the Meeting of the Parties. Similar principles are to be found in the Second Sulphur Protocol and the UNFCCC regimes. The latter regime specifies that its MCP is facilitative, cooperative, non-confrontational, transparent, timely and non-judicial.

Mandate/function

28. The Montreal Protocol Implementation Committee (MPIC) handles questions regarding non-compliance with the aim of securing an amicable solution.

---

[3] FCCC/CP/1998/16/Add.1 and FCCC/AG13/1998/2.

Likewise, the functions of the Second Sulphur Protocol Implementation Committee include: reviewing periodically compliance by Parties with the reporting requirements of the protocols and considering any submission or referrals made to it with a view to securing a constructive solution.

29. As for the standing Multilateral Consultative Committee of the UNFCCC, its mandate is to consider questions of implementation by: (a) clarifying and resolving questions; (b) providing advice on the procurement of technical and financial resources for the resolution of these difficulties; and (c) providing advice on the compilation and communication of information.

Invoking of procedures

30. The Montreal Protocol and the Second Sulphur Protocol have almost identical provisions relating to the invoking of procedures. Under the former regime the following could invoke the procedures: one or more Parties regarding another Party's implementation; a Party with regard to its own inability to comply fully in spite of its best bona fide efforts; and the secretariat with regard to preparation of reports under the Protocol and on any other information concerning compliance with the Protocol's provisions.

31. However, the role of the secretariat of the Second Sulphur Protocol is greater than that of the Montreal Protocol: it is not limited to the provision of information and is allowed to report on possible non-compliance. If upon reviewing the reports submitted by Parties, it becomes aware of possible non-compliance by any Party, it can request further information on the matter and it can report to the Implementation Committee in the case of failure to resolve the matter through administrative action and diplomatic contacts.

32. With regard to the Multilateral Consultative Process of the UNFCCC, that process is envisaged to be triggered by: (a) a Party with respect to its own implementation; (b) a group of Parties with respect to their own implementation; (c) a Party or group of Parties; and/or (d) the COP of the UNFCCC.

Other powers

33. Where it considers it necessary, the MPIC has the power to request through the secretariat more information on matters under its consideration. It also has the power to undertake information-gathering inside the territory of a Party concerned but only "upon invitation of the Party concerned". The Implementation Committee of the Second Sulphur Protocol possesses similar powers.

34. COP 1 of the UNFCCC provided, *inter alia*, the mandate for undertaking an in-depth review of individual reports of Annex I Parties. That COP also agreed to the possibility of on-site visits to Annex I country Parties, almost all of which extended invitations to this effect.

35. Experience has shown that the in-depth reviews, including country visits, have been conducted in a facilitative and non-confrontational manner. Both are carried out by experts drawn from developed countries, economies in transition and developing countries. Secretariats of several intergovernmental organizations have also provided experts. How the in-depth reviews would relate to article 13 of the UNFCCC remains to be seen.

Outcome

36. The MPIC forwards a report to the Meeting of the Parties of the Montreal Protocol, including any recommendations it considers appropriate. The Implementation Committee of the Second Sulphur Protocol also reports to the LRTAP Parties on its activities at the annual sessions and makes such recommendations as it considers appropriate regarding compliance with the Protocol. Again, the outcome of the MCP of the UNFCCC is envisaged to be a

report that the standing Committee submits to the COP along with concerned Parties' comments on the conclusions and recommendations of the report.

5. Institutional aspects of precedents

37. Issues relating to the institutional aspects of the "resolution of questions" mechanisms include the matter of composition of such a mechanism and the regularity of meetings.

Composition

38. The Implementation Committee of the Montreal Protocol consists of ten members while that of the Second Sulphur Protocol is composed of eight members. Apart from this aspect the two regimes concerned are comparable in matters related to composition. Members of the implementation committees of both the Montreal Protocol and the Second Sulphur Protocol are elected by the Parties of the respective regimes on the basis of equitable geographical distribution.

39. Elected members under the two regimes concerned serve a term of two years and may be re-elected but only for one consecutive term. To ensure a certain level of experience among the members serving on the Committees, only half are replaced every year. Furthermore, the committees concerned elect their own president and vice-president, both of whom serve a one-year term. In the UNFCCC context the question of the composition of the standing committee proposed to be created under article 13 remains unresolved.

Regularity of meetings

40. MPIC meets at least biannually, unless it decides otherwise, and its meetings are organized by the secretariat. The Implementation Committee of the LRTAP meets twice a year, unless it decides otherwise. However, the standing committee proposed to be established for the purpose of article 13 of the UNFCCC is envisaged to meet at least once a year and, whenever practicable, in conjunction with sessions of the COP or its subsidiary bodies.

E. NEW DEVELOPMENTS

1. Kyoto Protocol to the United Nations Framework Convention on Climate Change

41. Several other related precedents in the area of resolution of questions are also evolving. First among these is the Kyoto Protocol to the UNFCCC. This Protocol was adopted by the COP of the UNFCCC on 11 December 1997. Article 18 of the Kyoto Protocol requires the COP of the UNFCCC, serving as the meeting of the Parties to the Protocol to approve, at its first session, appropriate and effective procedures and mechanisms to determine and address cases of non-compliance with the Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance.

42. At the same time article 16 of the Kyoto Protocol enables the COP of the UNFCCC serving as the Meeting of the Parties to the Protocol (MOP) to consider and to modify, as appropriate, the application of the MCP referred to in article 13 of the UNFCCC. Any MCP that may be applied to the Kyoto Protocol is to operate without prejudice to the procedures and mechanisms established under article 18 of that Protocol.

43. How the procedures and mechanisms to be developed under the Kyoto Protocol will relate to what is created under article 13 of the UNFCCC remains to be seen. Any modification in the application of the MCP referred to in article 13 for the purposes of the Kyoto Protocol may have an impact on other processes based on that article. Moreover, the provisions of the UNCCD may possibly

overlap with the provisions of the Kyoto Protocol, given the scope and the breadth of the former.

44. In 1999, the COP of the UNFCCC noted the valuable progress made during the tenth and eleventh sessions of the subsidiary bodies of the Joint Working Group on compliance (JWG). The advancement was made especially in the understanding and identifying elements, procedures and mechanisms relating to a compliance system under the Kyoto Protocol. However, the COP noted also that much work remained to be done and that efforts must be made to intensify negotiations.

45. At the twelfth session of the subsidiary bodies, the JWG further developed the elements and procedures and mechanisms pertaining to a compliance system based on a synthesis of submissions from previous meetings, discussions held at the eleventh session of the subsidiary bodies and further proposals from Parties. The JWG set out a framework of requisite elements of a compliance system for the Kyoto Protocol. It reflects an emerging consensus on the overall structure of a compliance system. For example, most Parties have proposed a compliance system that will involve the operation of one or more branches, components or procedures for the general treatment of cases. Further discussion is needed on the way in which, and the extent to which, breaches of eligibility requirements under the Kyoto mechanisms would be addressed within the compliance system; the form and nature of any review or appeal; as well as what should be the role of the COP/MOP. A clarification of views would be required for the outcomes or consequences of non-compliance or potential non-compliance; and, finally, decisions which outcomes or consequences would be predetermined and the amount of discretion that the branches, components or procedures should have in applying outcomes or consequences.

46. In brief, UNFCCC continues working on the procedures and mechanisms of a compliance system under the Kyoto Protocol. Negotiations are far from being finalized, but consensus is being achieved in several key issues which pave the road towards a comprehensive and somewhat innovative compliance review system.

47. Article 3 of the UNCCD suggests an approach to implementation that is integrated and based on partnership and participation. If the COP decides that the mechanisms and procedures of article 27 should reflect such an approach, then the participatory notions of article 15 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Convention on Public Participation) might be of relevance.

2. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

48. The Convention on Access to Information was adopted by the Environment for Europe Conference held on 23-25 June 1998. It should be borne in mind in considering the possible relevance of this Convention that it relates to a restricted geographic area and has yet to enter into force. Article 15 of that Convention provides for reviewing compliance by requiring the Meeting of the Parties to establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance. The arrangements are to allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to that Convention.

3. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

49. Another example lies in article 17 of the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. This latter convention was adopted and opened for signature in Rotterdam on 10-11 September 1998. The Convention on Prior

Informed Consent also envisages the development of a non-compliance regime. Its article 17 requires the governing body of the Convention concerned to, as soon as practicable, develop and approve procedures and institutional mechanisms for determining non-compliance with the Convention and for treatment of Parties found to be in non-compliance.

50. The Convention on Access to Information as well as The Convention on Public Participation have not yet entered into force, so their possible impact to the UNCCD remains to be seen.

F. RELEVANT CONSIDERATIONS

51. In light of the above review, the COP of the UNCCD either by convening an open-ended working group of experts, may wish to address certain preliminary questions which, already contained in document ICCD/COP(3)/18, might include the following:

(a) What is the relationship between the procedures and institutional mechanisms pursuant to article 27 and the review of implementation by the COP pursuant to article 22, as well as the related provisions on communication of information pursuant to article 26?

(b) What is the relationship between the procedures and institutional mechanisms of article 27 and the dispute settlement procedures provided for under article 28? Are they mutually exclusive, i.e. should recourse to the procedures under one article prevent any recourse under the other?

(c) What are the types or range of questions that could be raised under the procedures and institutional mechanisms pursuant to article 27?

(d) What principles should govern the procedures and institutional mechanisms of article 27? Is it sufficient that they should be simple, transparent, facilitative and non-confrontational in character?

(e) What should the exact nature and composition of the institutional mechanisms contemplated under article 27? Should membership and participation in them be restricted to representatives of Parties or should there be a role for experts such as legal, economic, social or technical experts appointed on a personal basis?

(f) Who can invoke article 27? In other words, could article 27 be triggered by entities other than Parties, for example intergovernmental organizations? non-governmental organizations? the secretariat? the subsidiary bodies of the UNCCD?

(g) Should the procedures and mechanisms be public and open-ended or private? What should be the degree of transparency and flexibility?

(h) At what point in time and under what conditions can a Party trigger the application of the procedures and institutional mecharisms pursuant to article 27?

(i) What would be the time-frame of application of such procedures and mechanisms from the time they are triggered to the time conclusions are reached?

(j) What would be the modalities by which such procedures and mechanisms arrive at their conclusions? What would be the nature of their various phases?

(k) What would be the legal effect, if any, of the conclusions of such procedures and mechanisms?

(l) What measures should be taken for the adoption of the procedures and institutional mechanisms?

II. CONSIDERATION OF ANNEXES CONTAINING ARBITRATION AND CONCILIATION PROCEDURES

A. INTRODUCTION

52. In paragraph 5 of its resolution 6/1 entitled "Organization and programme of work for the interim period" (A/50/74, appendix II), adopted at its sixth session, the Intergovernmental Negotiating Committee for the Elaboration of an International Convention to Combat Desertification (INCD) requested the Interim Secretariat to prepare draft annexes on conciliation and arbitration for its eighth session. Document A/AC.241/50 was prepared in response to that request, and the present note is partly based on that document.

B. BACKGROUND

53. Article 28 of the Convention provides that, when ratifying, accepting, approving, or acceding to the Convention, or at any time thereafter, a Party other than a regional economic integration organization may declare in a written instrument that, in respect of any dispute concerning the Convention, it recognizes arbitration and/or submission to the International Court of Justice as compulsory means of dispute settlement in relation to any Party accepting the same obligation.

54. Article 28 further provides that, if the Parties to a dispute have not accepted the same or any procedure and if they have not been able to settle their dispute within twelve months following notification by one Party to another that a dispute exists between them, the dispute shall be submitted to conciliation at the request of any Party to the dispute.

55. Owing to time pressure during the negotiation of the Convention, it was not possible to include annexes on conciliation and arbitration as part of the original text. Hence, paragraphs 2 and 6 of article 28 provide that arbitration and conciliation shall be in accordance with "procedures adopted by the Conference of the Parties in an annex as soon as practicable".

56. At its second session, the Conference of the Parties, by decision 2/COP.2[4], decided to include as a selected item on the agenda for its third and, if necessary, fourth session, consideration of annexes containing arbitration and conciliation procedures, in accordance with article 28, paragraphs 2(a) and 6 of the Convention. By decision 22/COP.2, the Conference of the Parties decided also to consider this issue further in the light of the progress of the negotiations on the same issues in other relevant environmental conventions with a view to deciding how to take this matter forward. The Conference of the Parties at its third session further decided to establish an open-ended ad hoc group to examine and make recommendations on the issues of arbitration and conciliation procedures, taking into account the document prepared by the secretariat.

---

[4] For decisions of the Conference of the Parties at its second session, see document ICCD/COP(2)/14/Add.1.

C. SUBMISSIONS BY PARTIES[5]

1) CANADA

ARBITRATION AND CONCILIATION PROCEDURES:

This submission is presented pursuant to III/20 of the Conference of the Parties to the Convention to Combat Desertification (the "COP"), which requests Parties to provide written comments on the questions of:

(a) Procedures for the resolution of questions of implementation (Article 27 of the Convention);

(b) Two draft annexes on arbitration and conciliation procedures (Article 28 of the Convention).

(This document reproduces only Part II on conciliation and arbitration procedures as Part I deals with another COP.4 document)

II) CONCILIATION AND ARBITRATION

As a general comment, Canada has no fundamental problems with the draft annexes on conciliation and arbitration outlined in document ICCD/COP(3)/7. We note that the text of these draft procedures borrows extensively from previous treaties, and in particular from the Convention on Biological Diversity, to which Canada is a Party.

This being said, we have a few specific comments and questions.

A) Draft Annex on Arbitration:

- regarding Paragraph 2(2), we seek further clarification on the intent of this provision and how it would be implemented in practice;

- regarding Paragraph 3(2), should the procedures also cover cases where there is disagreement as to which Parties share similar interests (see, in this regard, Paragraph 3(2) of the Draft Annex on Conciliation)?

- regarding the last sentence of Article 13, there may be cases where the final decision of the Tribunal does not require a determination that a claim is well founded in fact and law (for instance, in cases where the Tribunal find against the claimant).

B) Draft Annex on Conciliation:

- the annex could be made more comprehensive by adding provisions, similar to those used in the draft Annex on Arbitration, related to:

  - filling vacancies in a Commission;
  - confidential information;
  - costs bearing;
  - right of intervention by Parties to the Convention that are not parties to the dispute;
  - timing for decisions and proposals of a Commission;

---

[5] Reproduced without formal editing by the UNCCD secretariat.

- regarding Paragraph 3(2), there is room for further clarification on how the second sentence of this paragraph would apply;

- regarding Article 5, the words "to the dispute" should be added after the words "if asked to do so by a party".

Canada will pursue details of these questions in discussions with Parties at COP4 participating in the proposed Legal Panel.

2) ISRAEL

The position of the State of Israel regarding Decision 20/COP.3: "Resolution of questions of implementation, arbitration and conciliation procedures"

Annex V - Arbitration

Article 2(3):

According to this Article, the Secretariat shall forward the information regarding the dispute, which was submitted to it by the parties, to "all Parties to the Convention".

Such exposure is not desirable, since it might cause publication of the dispute and a "flood" of claims by other Parties, which might complicate the arbitration procedure. Moreover, confidentiality of proceedings and submissions relating to disputes is a principle recognized in various Conventions, inter alia, the WTO.

Therefore, Article 2(3) should read as follows:

"All Tribunal proceedings and submissions made by Parties to the Convention shall be kept confidential".

Article 3(2):

This Article, which provides that "In disputes between more than two parties, parties with same interest shall appoint one arbitrator jointly by agreement", is problematic.

In order for the Tribunal to decide by a majority vote of its members in a given dispute, it must be made up of an odd number. So, should there be, for instance, 3 different interests involved in the same dispute, the appointed 3 arbitrators would (pursuant to Art. 3(1) designate an additional agreed arbitrator. This would result in there being an even number of arbitrators.

Whilst, Israel feels that it is not desirable to force a party to appoint an arbitrator jointly with another party, it recognizes that, without the aforesaid obligation, a situation might be created whereby the interests of the respective parties would not be represented in a balanced manner.

Thus, it is suggested that word "shall" in the existing Article be replaced by the word "may", and an additional sentence, which appears in Article 3(2) in Annex VI regarding conciliation, be added at the end of the Article.

It is noted that, in addition, the word "in" in the sentence "parties in the same interest" should be replaced by the word "with" ("parties with the same interest"). Accordingly, Article 3(2) should read as follows:

"In disputes between more than two parties with the same interest may appoint one arbitrator jointly by agreement. Where two or more parties have separate interests or where is a disagreement as to whether they are of the same interest, they shall appoint their members separately".

Article 4(1):

It is suggested, that certain stipulations (similar to the stipulations which appear in Art. 3(1), regarding the identity of the President of the Tribunal who is designated by the Secretary General of the United Nations, be added to Article 4(1).

Therefore, it is suggested that the following paragraph be added at the end of Article 4(1):

"The designated President shall be proficient and shall not be a national of any of the parties to the dispute, not have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, not have dealt with the case in any other capacity. The designated President shall be a national of the Party to the Convention with whom all the parties to the dispute have diplomatic relations".

Article 4(2):

Similarly, it is suggested, that certain stipulations (similar to the conditions which appear in Art. 3(1) and to the suggested Art. 4(1) above), regarding the identity of the arbitrator who is designated by the Secretary-General of the United Nations, be added to Article 4(2). Therefore, it is suggested that the following paragraph be added at the end of Art. 4(2):

"The designated arbitrator shall be proficient and shall not be a national of any of the parties to the dispute, not have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity. The designated arbitrator shall be a national to a Party to the Convention with whom the relevant party to the dispute has diplomatic relations".

Article 5:

According to this Article, "the Tribunal shall render its decisions in accordance with the provisions of the Convention and international law". Since the term "international law" can be widely interpreted, it is suggested that the legal sources to which the Tribunal may refer be minimized.

Accordingly, it is suggested that the words "relevant accepted principles of" be added prior to the words "international law".

Article 8:

Prima facie, according to Article 8, and particularly according to Article 8(a), the parties undertake full disclosure of documents, which might be interpreted as including consent to submit confidential documents to the Tribunal. In order to clarify this issue, it is suggested that the existing Article 8 be changed to Sub-Article 8(1), and that a new Sub-Article 3(2), be added, as follows:

"(2) No party shall be required to submit information or present witnesses on issues which it deems confidential for reasons of national security or necessary to protect vital interests of the state"

Article 9:

In accordance with the modification suggested in reference to Art. 2(3) above (absolute confidentiality of the dispute), and to Article 8 (confidentiality of documents and witnesses), it is suggested that Article 9 be modified, and that the words "in confidence" between the words "receive" and "during" be deleted.

Article 10(1):

Notwithstanding the discretion granted to the Tribunal that in particular circumstances distribution of costs shall not be equal, Israel feels that the rule that costs will be borne by the Parties in equal shares should be enforced without exception.

It is therefore suggested, that the first part of Sub-Article 10(1) be omitted, i.e. to omit the words "Unless the Arbitral Tribunal determines otherwise because of the particular circumstances of the case".

Article 13:

Making an award in the absence of a party or due to a failure of a party to defend its case, at the request of the other party, is a drastic remedy. Hence, it is suggested that a procedure, which the Tribunal should apply before making such awards, be determined.

Accordingly, Article 13 would read as follows:

"(1) If one of the parties to the dispute does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal, in writing, to continue the proceedings and to make its award (hereinafter "the request").

(2) Upon receiving request, the Tribunal shall inform the party failing to appear or respond that such a request has been made, and allow it at least 30 days to respond in writing to the request. In addition, the Tribunal shall schedule a hearing on the issue and invite non-appearing or non-responding party to appear at the hearing and present its argument.

(3) If a party fails to respond to the request or fails to appear at the hearing, the Tribunal may then decide to continue proceedings, with the proviso that it may only do so if it satisfies itself that the claim is well founded in the fact and law".

Article 14:

It is generally accepted that parties to a dispute may agree on matters of procedure, and that such a consent binds the tribunal or court. Therefore, it is suggested that Article 14 be modified, as follows:

"The parties may agree on rules of procedure that shall govern the dispute and which shall bind the Tribunal. In absence of such agreed rules, decisions on both the procedure and substance of the Tribunal shall be consistent with the Convention and its Annex".

A new Article (before Art. 15)- Interim Review stage:

Since the awards and decisions of the Tribunal bind the parties according to international law, and in view of the fact that there is no appeal procedure, Israel feels that the parties should be able to submit their comments on the draft report of the Tribunal, before it makes its final award. Indeed, a unique procedure of arbitration has developed in international law, according to which

parties are able to submit their comments on the draft award of the Tribunal, before the final award was made, and only after receiving the comments does the Tribunal makes its final award. This interim procedure enables the parties to negotiate at an advanced stage of the proceedings.

Thus, it is suggested that a new article (before Art. 15) be added, as follows:

"Interim review stage:

(1) Following the consideration of submissions and oral arguments, the Tribunal shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the Tribunal, the parties shall submit their comments in writing.

(2) Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the Tribunal shall issue an interim report to the parties, including both the descriptive sections and the Tribunal's findings and conclusions. Within a period of time set by the Tribunal, a party may submit a written request to the Tribunal to review particular aspects of the interim report. At the request of a party, the Tribunal shall hold another meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and issued as such to the parties.

(3) The findings of the final Tribunal report shall include a discussion of the arguments made at the interim review stage".

Annex VI - Conciliation

Article 2:

It is suggested the words "Paragraph 4" be added after the words "Article 24".

Article 3(i):

It is suggested that certain stipulations regarding the identity of the chosen President of the Conciliation Commission (similar to the stipulations which appear on Art. 3(i) to Annex V and in the suggested Article 4(1) to Annex V), be added to Article 3(i). Therefore, it is suggested that the following paragraph be added at the end of Article 3(i), as follows:

"The designated President shall not be a national of any of the parties to the dispute, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity. The designated President shall be a national of a Party to the Convention with whom all the parties to the dispute have diplomatic relations".

Article 4:

Similarly, it is suggested that certain stipulations regarding the identity of the conciliator (similar to the stipulations which appear in Article 3(i) to Annex V and in the suggested Article 3 to this Annex), be added to Article 4 (regarding the appointment of the conciliator by the Secretary-General of the United Nations).

Hence, it is suggested that the existing Article 4 be changed to Article 4(1), and the following Sub-Articles be added:

(2) The appointed conciliator shall be proficient and shall not be a national of any of the parties to the dispute, not have his or her usual place of residence in the territory of one of these parties, not be employed by any of them, nor have dealt with the case in any other capacity.

(3) The appointed conciliator shall be a national to a Party to the Convention with whom the relevant party to the dispute has diplomatic relations".

(4) The appointment of the conciliator shall be subject to the relevant party's consent".

A New Article - Confidentiality:

It is suggested that a new article be added, under which all documents submitted to the Conciliation Commission, all proceedings and all its internal discussions and proposals shall be confidential.

Thus, it is suggested that a new article be added, as follows:

"Confidentiality:

All Commission proceedings and submissions made by the parties shall be kept confidential".

Article 9:

According to Article 9, "The Conciliation Commission shall render a proposal for resolution of the dispute, which the parties shall consider in good faith". The existing article does not oblige the Commission to help the parties to reach a mutually agreed upon solution, before it officially renders a proposal for resolution. Since the proposals of the Commission, although not binding, have input on the parties, we support determining a preliminary procedure according to which the Commission shall attempt to help the parties to reach a mutually agreed upon solution. Only if such attempt fails, may the Commission present a proposal for the resolution of the dispute to the parties.

Accordingly, it is suggested that the existing Article 9 be replaced by the following Article:

"The Conciliation Commission shall attempt to help the parties to reach a mutually agreed upon solution. If after seriously making such attempt, the Conciliation commission is of the view that such a solution cannot be achieved, then the Conciliation Commission may present a proposal for the resolution of the dispute to the parties. The proposal shall be confidential, and shall be presented to the parties only. The parties shall consider the proposal of the Conciliation Commission in good faith".

3) MADAGASCAR

Decision 20/COP.3: Resolution of questions of implementation, arbitration and conciliation procedures: the Government of Madagascar supports the proposal to hold negotiations in parallel with those of the Convention on Biological Diversity and the Framework Convention on Climate Change.

4) PORTUGAL ON BEHALF OF THE EUROPEAN UNION AND ITS MEMBER STATES

Arbitration and Conciliation Procedures

The European Union is very grateful to the Secretariat for producing the draft texts concerning arbitration and conciliation procedures contained in the annex to document UNEP/CHW/CG/1/3, which we believe provides an excellent basis for further discussion.

The European Union welcomes the opportunity provided by the open-ended ad hoc group of experts to develop conciliation and arbitration procedures under Article 20 at COP 1.

We believe that the development of procedures should be a reasonably straightforward task, since the Secretariat's proposed texts in the annex closely follow the form and content of the conciliation and arbitration procedures already in place for other multilateral environmental agreements, especially those of the Biodiversity Convention.

The European Union can, to a very large extent, agree with what is proposed in the Secretariat's texts as set out in the annex to UNEP/CHW.1/3. But will be happy to discuss variations others might raise at COP.4 with a view to refining their content still further. In view of how well precedented the proposed conciliation and arbitration procedures are, we consider that it should be possible to complete negotiation of them and adopt them at COP4.

D. STATUS OF ANNEXES AND PROCEDURE FOR ADOPTION

57. Consistent with article 19 of the Convention, annexes on arbitration and conciliation will form an integral part of the Convention. Once adopted by the Conference of the Parties in accordance with article 19, they shall enter into force for all Parties to the Convention six months after the date of communication by the Depositary of their adoption, except for Parties which notify in writing their non-acceptance, in accordance with article 19.

E. TIMING OF ADOPTION OF ANNEXES

58. The Convention did not require the adoption of annexes on conciliation and arbitration at the first session of the Conference of the Parties. It rather provided that such annexes shall be adopted "as soon as practicable".

F. THE DRAFT ANNEXES

59. Procedures for arbitration and conciliation to resolve disputes relating to the interpretation or application of conventions abound. The wording and structure of such procedures is, therefore, well established. In preparing the drafts it appeared most appropriate to find inspiration in precedents, with the important proviso that procedures must be adapted to the subject-matter in hand. Precedents examined include the Optional Rules for Arbitrating Disputes Between Two States of the Permanent Court of Arbitration, Annex VI of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention), procedures pursuant to the Vienna Convention for the Protection of the Ozone Layer (Vienna Convention), Annex II of the United Nations Convention on Biological Diversity (UNCBD).

60. In light of the substantive provisions contained in the UNCCD, it would appear that flexible and concise procedures would be best suited to the Convention. Such procedures would let the Parties adapt the procedures to

relevant circumstances. In any case, they should not involve cumbersome proceedings for the Parties. Against this background, the draft annexes above-mentioned are largely modelled on concise procedures such as relevant annexes of the UNCBD and the Basel Convention rather than the longer form of the Rules of the Permanent Court of Arbitration.

1) Draft annex on arbitration

61. A first draft annex on arbitration and a draft annex on conciliation procedures was submitted at the third session of the Conference of the Parties contained in ICCD/COP(3)/7. These annexes have further been updated in conformity with views and comments submitted by Parties and other interested institutions. Consequently, new relevant developments and trends and specific features addressing the nature and legal characteristics of the UNCCD have been included.

62. The revised draft of both annexes thus intends to respond to the needs of possible disputes that may arise in the process of the implementation of the Convention. The draft annex on arbitration procedures proposes some changes, i. e. article 2 (content of the notification of a claimant Party to the Permanent Secretariat), article 6 (conduct of proceedings), article 8 (interim measures of protection), article 18 (authority of award) and article 19 (controversy in interpretation or implementation).

ARBITRATION

Purpose

Article 1

The present Annex provides the procedures for arbitration referred to in article 28 of the Convention.

Notification of disputes

Article 2

1. The claimant Party shall notify the Permanent Secretariat that the Parties are referring a dispute to arbitration pursuant to article 28 of the Convention. The notification shall state:

(a) The subject-matter of arbitration;

(b) The articles of the Convention, the interpretation or application of which are at issue;

(c) A statement of the facts supporting the claim; and

(d) The relief or remedy sought.

2. If the Parties do not agree on the subject-matter of the dispute before the President of the Arbitral Tribunal is designated pursuant to Article 3, the Tribunal shall determine the subject-matter.

3. The Permanent Secretariat shall forward the information thus received to all Parties to the Convention.

Appointment of arbitrators

Article 3

1. In disputes between two parties, a Tribunal shall be established consisting of three members. Each of the parties to the dispute shall appoint an arbitrator and the two arbitrators so appointed shall designate by common agreement the third arbitrator who shall be the President of the Tribunal. The latter shall not be a national of any of the parties to the dispute, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.

2. In disputes between more than two parties, parties in the same interest shall appoint one arbitrator jointly by agreement.

3. Any vacancy shall be filled in the manner prescribed for the initial appointment.

Failure to appoint arbitrator or designate President

Article 4

1. If the President of the Tribunal has not been designated within two months of the appointment of the second arbitrator, the Secretary-General of the United Nations shall, at the request of a Party, designate the President within a further two-month period.

2. If one of the Parties to the dispute does not appoint an arbitrator within two months of receipt of the request, the other Party may inform the Secretary-General of the United Nations, who shall make the designation within a further two-month period.

Basis for decisions

Article 5

1. The Tribunal shall render its decisions in accordance with the provisions of the Convention and international law.

Conduct of proceedings

Article 6

The Tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality and that any stage of the proceedings each party is given a full opportunity of presenting its case.

Rules of procedure

Article 7

Unless the parties to the dispute otherwise agree, the Arbitral Tribunal shall determine its own rules of procedure.

Interim measures of protection

Article 8

1. The Tribunal may, at the request of one of the Parties, recommend essential interim measures of protection.

2. Such interim measures shall be established in the form of an interim award.

3. The Tribunal shall be entitled to require security for the costs of such measures.

Facilitating work of the Tribunal

Article 9

The parties to the dispute shall facilitate the work of the Arbitral Tribunal and, in particular, using all means at their disposal, shall:

(a) Provide it with all relevant documents, information and facilities; and

(b) Enable it, when necessary, to call witnesses or experts and receive their evidence.

Confidentiality of information

Article 10

The parties and the arbitrators are under an obligation to protect the confidentiality of any information they receive in confidence during the proceedings of the Tribunal.

Costs of Tribunal

Article 11

1. Unless the Arbitral Tribunal determines otherwise because of the particular circumstances of the case, the costs of the Tribunal shall be borne by the parties to the dispute in equal shares.

2. The Tribunal shall keep a record of all its costs, and shall furnish a final statement thereof to the parties.

Intervention in proceedings

Article 12

Any Party to the Convention that has an interest of a legal nature in the subject-matter of the dispute, which may be affected by the decision in the case, may intervene in the proceedings with the consent of the Tribunal.

Counter-claims

Article 13

The Tribunal may hear and determine counter-claims arising directly out of the subject-matter of the dispute.

Non-appearance of a party

Article 14

If one of the parties to the dispute does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and to make its award. The absence of a party or a failure of a party to defend its case shall not constitute a bar to the proceedings. Before rendering its final decision, the Tribunal must satisfy itself that the claim is well founded in fact and law.

Majority for decision

Article 15

Decisions both on procedure and substance of the Tribunal shall be taken by a majority vote of its members.

Time limit for final decision

Article 16

The Tribunal shall render its final decision within five months of the date on which it is fully constituted unless it finds it necessary to extend the time limit for a period which should not exceed five more months.

Final decision

Article 17

The final decision of the Tribunal shall be confined to the subject-matter of the dispute and shall state the reasons on which it is based. It shall contain the names of the members who have participated and the date of the final decision. Any member of the Tribunal may attach a separate or dissenting opinion to the final decision.

Authority of award

Article 18

1. The award shall be made in writing and binding on the parties to the dispute. It shall be without appeal unless the parties to the dispute have agreed in advance to an appellate procedure.

2. The parties undertake to carry out the award without delay.

3. The final decision may be made public only with the consent of both parties.

Controversy on interpretation or implementation

Article 19

Within sixty days after the receipt of the final decision, either party, with notice to the other party, may request that the Tribunal give an interpretation of the final decision or the manner in which it shall be implemented.

Italicized headings

Article 20

The italicized headings of the present procedures are for reference purposes only. They shall be disregarded in the interpretation of the procedures.

2) Draft annex on conciliation

63. As with the previous annex, the draft annex on conciliation has undergone several modifications and additions to make it more in tone with relevant developments and account has also been made of comments and suggestions by Parties. These improvements are found in paragraphs 2 and 3 of article 2 (creation and beginning of work of Conciliation Commission), article 8 (costs of the proceedings), article 9 (submission of statements), article 10 (role of the Conciliation Commission), article 11 (co-operation with the Conciliation Commission) and paragraph 2 of article 13.

CONCILIATION

Purpose

Article 1

The present Annex provides the procedures for conciliation referred to in article 28 of the Convention.

Creation of Conciliation Commission

Article 2

1. A Conciliation Commission shall be created at the request of any party to a dispute in accordance with the provisions of article 28, paragraph 6 of the Convention.

2. Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it confirmed in writing.

3. If the party rejects the invitation, there will be no conciliation proceedings.

Composition and appointment of members

Article 3

1. The Conciliation Commission shall, unless the parties otherwise agree, be composed of five members, two appointed by each party concerned and a President chosen jointly by those members.

2. In disputes between more than two parties, parties in the same interest shall appoint their members of the Commission jointly by agreement. Where two or more parties have separate interests or there is a disagreement as to whether they are of the same interest, they shall appoint their members separately.

Failure to appoint members within time limit

Article 4

If any appointments by the parties are not made within two months of the date of the request to create a Conciliation Commission, the Secretary-General of the United Nations shall, if asked to do so by the party that made the request, make those appointments within a further two-month period.

Failure to appoint President within time limit

Article 5

If a President of the Conciliation Commission has not been designated within two months of the last of the members of the Commission being appointed, the Secretary-General of the United Nations shall, if asked to do so by a party to the dispute, designate a President within a further two-month period.

Procedure

Article 6

The Conciliation Commission shall, unless the Parties to the dispute otherwise agree, determine its own procedure.

Decisions on competence

Article 7

A disagreement as to whether the Conciliation Commission has competence shall be decided by the Commission.

Costs of the proceedings

Article 8

The costs are borne equally by the parties unless the settlement agreement provides for a different apportionment.

Submission of statements

Article 9

1. The Conciliation Commission, upon its appointment, requests each party to submit a written statement describing the general nature of the dispute and the points at issue. Each party shall send a copy of its statement to the other party.

2. The Conciliation Commission may request each party to submit a further written statement of its position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of its statement to the other party.

Role of the Conciliation Commission

Article 10

1. The Conciliation Commission assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

2. The Conciliation Commission may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request that the need for a speedy settlement of dispute.

3. The Conciliation Commission may, at any time of the conciliation proceedings, make proposals for a settlement of the dispute.

Co-operation with the Conciliation Commission

Article 11

The parties shall co-operate with the Conciliation Commission, in particular, shall endeavour to comply with requests by the Commission to submit written materials, provide evidence and attend meetings.

Majority required for decisions

Article 12

Decisions both on procedure and substance of the Conciliation Commission shall be taken by a majority vote of its members.

Proposal for resolution

Article 13

1. The Conciliation Commission shall render a proposal for resolution of the dispute, which the parties shall consider in good faith.

2. If the parties reach an agreement on a settlement of the dispute, they draw up and sign a written settlement agreement. If requested by the parties, the Conciliation Commission can draw up or assist the parties in drawing up the settlement agreement.

Italicized headings

Article 14

The italicized headings of the present procedures are for reference purposes only. They shall be disregarded in the interpretation of the procedures.

- - - - -